

C546lebc

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x

4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 v.

7 11 CV 9186 (PAE)

8 LEBANESE CANADIAN BANK, SAL,  
9 et al., CEDAR EXPORTS AUTO  
10 SALES,

11 Defendants.

12 -----x  
13 New York, N.Y.  
14 May 4, 2012  
15 11:15 a.m.

16 Before:

17 HON. PAUL A. ENGELMAYER,

18 District Judge

19 APPEARANCES

20 PREET BHARARA

21 United States Attorney for the  
22 Southern District of New York

23 ALEXANDER J. WILSON

24 JASON H. COWLEY

25 Assistant United States Attorneys

HAIG V. KALBIAN, ESQ.

Attorney for Defendant Ellissa and Ayash

WARNER F. YOUNG, ESQ.

Attorney for Cybamar and GMBH

BRADLEY S. DEFOE, ESQ. (VIA TELEPHONE)

Attorney for Defendant Auto Rama, Inc.

R. DANIEL BOYCE, ESQ.

Attorney for Defendant Hanna and Cary Auto Sales

C546lebc

1  
2 Appearances (Cont'd)3  
4 NABIH H. AYAD, ESQ.

Attorney for Defendant Global Shipping

5 TIMOTHY P. SHUSTA, ESQ.

6 Attorney for Defendant H&amp;D Export &amp; Import

7 ELIAS MUAWAD, ESQ.

8 Attorney for Defendant HH Automotive and United Auto

9 VINOO P. VARGHESE, ESQ.

10 ESTHER A. NGUONLY, ESQ.

11 Attorneys for Defendant Chedid

12 ALEX V. HERNANDEZ, ESQ.

13 Attorney for MGM Global Trading

14 CHRISTOPHER J. CLARK, ESQ.

15 Attorney for LCB SAL

16 HAIG V. KALBIAN, ESQ.

17 Attorney for Defendants in Rem Ellissa, Hassan, Ayash

18 ALESSANDARA DeBLASIO, ESQ.

19 Attorney for Defendant in Rem Cedar Exports Auto Sales

20

21

22

23

24

25

C546lebc

1 (In open court; case called)

2 THE COURT: Mr. Defoe, can you hear us?

3 MR. DeFOE: Yes, I can.

4 THE DEPUTY CLERK: Plaintiff ready?

5 MR. WILSON: Yes. Good morning, your Honor. Alex  
6 Wilson for the United States, and with me is my colleague Jason  
7 Cowley and Sharon Levin.

8 THE COURT: Good morning.

9 THE DEPUTY CLERK: Defendants. Ma'am.

10 MS. DeBLASIO: Good morning, your Honor. Alessandra  
11 DeBlasio on behalf of Cedar Exports Auto Sales, one of the  
12 defendants-in-Rem.

13 THE COURT: Very good.

14 MR. VARGHESE: Good morning, your Honor. On behalf of  
15 Jean Y. Chedid, Varghese & Associates. I am Vinoo Varghese  
16 and with me is Esther Nguonly.

17 THE COURT: Good morning.

18 MR. MUAWAD: Good morning, your Honor. Elias Muawad,  
19 and I am appearing on behalf of HH Auto Motor, Inc., in Rem. I  
20 am also appearing in place of Joseph Arnone from Michigan where  
21 I am from and I am temporarily substituting in for today only  
22 for United Quality Auto Sales, Inc. He did talk to your staff  
23 about it and received permission. Hopefully that is okay with  
24 the Court.

25 THE COURT: That is okay. Thank you.

C546lebc

1                   MR. SHUSTA: Good morning, your Honor. Tim Shusta  
2 appearing for defendants-in-Rem Mansour Brothers Auto Trading,  
3 H & D Export and Import, Safari Enterprises and Safari Motors,  
4 LLC.

5                   MR. BOYCE: Good morning, your Honor. Dan Boyce from  
6 North Carolina. I represent Cary Auto Sales, Inc., and Bassam  
7 Hanna, the owner.

8                   THE COURT: Good morning.

9                   MR. HERNANDEZ: Good morning, your Honor. Alex  
10 Hernandez from Connecticut. I represent MGM Global Trading,  
11 LLC.

12                  THE COURT: Good morning.

13                  MR. RESNIK: Good morning, your Honor. Scott Resnik  
14 and Emily Stern on behalf of defendants-in-Rem Kassab Auto  
15 Dealer.

16                  THE COURT: Good morning.

17                  MR. MAZUREK: Your Honor, Henry Mazurek on behalf of  
18 Cybamar Swiss, LLC, defendant-in-Rem, and defendant-in-Rem  
19 United Auto Enterprise. I note, your Honor, that I understand  
20 your Court's order was that a notice of appearance should be  
21 filed by today's date. I am here and I am asking permission of  
22 the court to be make a limited appearance only because the  
23 clients have not completed their obligation -- fulfilled their  
24 obligation under the retainer agreement. I explained to them  
25 they have to do so by today, but I have to tell the Court I

C546lebc

1 don't have an executed retainer at this time. I would ask the  
2 Court's authorization if I can have until May 15th to inform  
3 the Court whether they have complied with that obligation or  
4 other means of representation.

5 THE COURT: I will permit that. Thank you.

6 MR. KALBIAN: Haig Kalbian from Washington, D.C. I  
7 represent, specially appearing on behalf of the in Rem  
8 defendants Ellissa Holding Company and Hassan Ayash Exchange  
9 Co.

10 THE COURT: Good morning.

11 UNIDENTIFIED SPEAKER: (Inaudible).

12 THE COURT: I am sorry. I didn't hear you. On behalf  
13 of whom?

14 UNIDENTIFIED SPEAKER: (Inaudible).

15 MR. CLARK: Your Honor, Chris Clark of Dewey &  
16 LeBoeuf, and Kevin Walsh for defendant-in-Rem Lebanese Canadian  
17 Bank. We're appearing pursuant to our notice of claim filed  
18 April 5th, 2012.

19 THE COURT: Very good. Good morning.

20 Are there any other counsel who have not yet --

21 MR. AYAD: Judge, good morning. Nabih Ayad appearing  
22 on behalf of A & J Auto Sales in-Rem-defendants.

23 THE COURT: Very good.

24 MR. YOUNG: Good morning, your Honor, Warner Young and  
25 I am here for Cybamar Swiss, GMBH.

C546lebc

1                   THE COURT: Good morning.

2                   Is there anyone else?

3                   THE DEPUTY CLERK: The two gentlemen here, Christopher  
4 Clark.

5                   THE COURT: That is Mr. Walsh and Mr. Clark.

6                   I think we've heard from everyone. I thank you all  
7 for coming. To the extent that counsel speak today, I will ask  
8 you to preface your remarks by identifying yourself for my  
9 benefit and also that of the court reporter.

10                  The purpose of this initial pretrial conference is  
11 primarily to make sure we have a coherent, clear schedule for  
12 events going forward. Just to review the day, I have received  
13 from the government a proposed case management plan. I assume  
14 all counsel have received it as well. The government  
15 represents that with two exceptions there have been no  
16 objections to that plan. The principal object involves people  
17 who have not appeared or that served rather as of the date of  
18 the plan and the objection being understandably that those  
19 people don't want to be kept to the schedule that is set within  
20 the plan. I am going to return in a moment to make sure there  
21 aren't any other objections with respect to that plan.

22                  Second of all, there have been a number of motions to  
23 dismiss already filed in this case. My notes indicate that the  
24 pending motions to dismiss are by Hijazi General Trading,  
25 Dealer Services Corp., although I think that may have been

C546lebc

1 mooted by a subsequent settlement; Lebanese Canadian Bank  
2 Global Shipping Services. As I indicated when I think we spoke  
3 before my intention is to have all motions to dismiss  
4 coordinated on a common schedule and therefore with respect to  
5 those pending motions, once we have in place at the end of this  
6 conference a case management plan, I will read those motions as  
7 in effective having been duly filed pursuant to the schedule  
8 set. If those movants are interested in a swapping out a  
9 fuller or different motion by the due date, I authorize them to  
10 do that.

11 Next, we have five motions that are either directed at  
12 the temporary restraining order or are styled as seeking to the  
13 release of property. Those five motions are respectively by A  
14 & J Auto Sales. I note that we have received a reply brief  
15 from A & J and they are joined by Car UZD. They do appear to  
16 be new arguments by the defendants in replay and I will hear  
17 from the government in a moment, but I am inclined to authorize  
18 a surreply as to those arguments.

19 There is also a motion by Eagle Auto Sales and Ace  
20 Auto Leasing. That I think may have been mooted by a  
21 subsequent settlement. There is a pending fully briefed motion  
22 by Cedar Exports and I will rule on that today at the  
23 conference. And then finally there is a motion from Kassab  
24 Auto Dealer as to which a reply brief is due on May 11th.

25 Finally, I received a motion from the government

C546lebc

1 seeking authorization to serve counsel with respect to certain  
2 entities. I am inclined to grant that motion, but I am glad to  
3 hear if there is an objection to that.

4 So that sets the framework in terms of the issues  
5 before me. Let's begin by talking about the case management  
6 plan, which is really the most important thing to deal with  
7 today. Let me ask if there are any defense counsel who object  
8 to the schedule that has been proposed by the government in the  
9 proposed case management plan and scheduling order.

10 MR. AYAD: Nabih Ayad for A & J Auto. Your Honor, we  
11 joined in Global Shipping motion to dismiss for jurisdictional  
12 grounds. I don't know if you have that before you. I knew we  
13 filed it and I want to make sure you have it. If you want me  
14 to wait until after to discussion that --

15 THE COURT: You are quite right that there is a motion  
16 from A & J Auto. I thought that was solely directed at the TRO  
17 and not in addition to the motion to dismiss.

18 MR. AYAD: There are two of them. One for the TRO and  
19 one for--

20 THE COURT: Correct. The record will so then reflect.

21 MR. AYAD: Thank you so much.

22 THE COURT: Now, in coming back to the case manage --

23 MR. MAZUREK: Yes. Henry Mazurek on behalf of Cybamar  
24 Swiss; GMBH, LLC.; and United Auto Enterprise. I just  
25 recognized there is one issue that is not mentioned in the

C546lebc

1 management plan with respect to responsive pleadings. For  
2 those defendants who have had stipulations to extend the time  
3 to answer, there is no date by which the answers need to be  
4 pleaded. The date for our motions to dismiss --

5 THE COURT: So give me the paragraph number, sir.

6 MR. MAZUREK: It is not in here I guess is what I am  
7 saying. Paragraph 4. There is no indication as to when all  
8 answers for those defendants who have been served at this time  
9 needs to be answered. I would ask that be amended to include  
10 answers and motions to dismiss shall be filed by June 4th.

11 THE COURT: Let me ask the government, does that sound  
12 reasonable?

13 MR. WILSON: No, objection, your Honor.

14 THE COURT: Thank you.

15 MR. MAZUREK: Thank You, Judge.

16 THE COURT: Again, the question now for defense  
17 counsel is any one else with clarifications like that or  
18 objections to the proposed case management plan?

19 MR. BOYCE: Yes, your Honor. We have filed or we have  
20 submitted a claim. We have filed an answer. We do not oppose  
21 the case management schedule. I just need clarification. My  
22 understanding is it excludes motions for summary judgment. For  
23 reasons that I can get into later, we're going to request that  
24 the Court consider expediting motions for summary judgment.

25 THE COURT: I don't think that the schedule excludes

C546lebc

1 motions for summary judgement. I think it provides that  
2 motions for summary judgment under my rules would be triggered  
3 by the close of fact discovery. Under my individual rules, two  
4 weeks after the close of fact discovery, a party that seeks to  
5 move for summary July is instructed t write a premotion letter  
6 to me previewing the anticipated motion. Opposing counsel then  
7 has a week to respond in kind in a short letter, and then I  
8 will typically have very soon thereafter a premotion conference  
9 intending to give me a preview of that summary judgment  
10 litigation and enable me to engage with you and perhaps offer  
11 some guidance as to what would be productive for the rest.

12 MR. BOYCE: Can we be heard later then on a request  
13 for an expedited motion?

14 THE COURT: Well, why don't we address that now  
15 because it does relate to the case management plan.

16 For what reason would you be seeking an expedited  
17 motion for summary judgment?

18 MR. BOYCE: This is somewhat a unique case. I have  
19 got a client who is one of a small fish here. The government  
20 seized about \$12,000 in an account and one car. So it is not a  
21 lot of money at stake. We have been attempting to negotiate a  
22 settlement for several months now. The basic terms of the  
23 settlement agreement are acceptable to us; but because of a  
24 number of different factors, we're unable to settle the  
25 settlement agreement because it is not global in scope. We had

C546lebc

1 to undergo a 480 audit by IRS and successfully completed that.  
2 We have another letter from the Department of Treasury asking  
3 for information identical to the information that was provided  
4 in this case. There are all these tentacles of the government  
5 that continue to come around my client, including now  
6 immigration issues.

7 So we're seeking a global settlement. It doesn't look  
8 like the U.S. Attorney's office is able to do such a thing so  
9 we're basically out of business, not because of the Court's  
10 restraining order but because in the industry right now the  
11 insurance companies and the auto auction houses won't deal with  
12 us because this lawsuit is pending. If we have any chance of  
13 staying in business and staying quite frankly in the United  
14 States, we need this expedited so we can get a court ruling on  
15 whether or not we can be dismissed from the lawsuit.

16 THE COURT: My instinct in candor is with all the  
17 individual parties here I would prefer to have summary judgment  
18 motions like motions to dismiss on a common schedule.

19 I will hear from the government on that.

20 MR. BOYCE: We will be willing to waive discovery.

21 MS. DeBLASIO: Your Honor --

22 THE COURT: Who are you?

23 MS. DeBLASIO: Alessandra DeBlasio on behalf of Cedar  
24 Exports.

25 Depending on the Court's ruling later on on our motion

C546lebc

1 for the release of assets, we too would be interested in an  
2 expedited summary judgment motion schedule.

3 THE COURT: With the understanding that my inclination  
4 is to try to coordinate.

5 MS. DeBLASIO: Thank you.

6 THE COURT: Do you have something else?

7 MS. DeBLASIO: Oh, no. I was just standing while you  
8 were speaking.

9 THE COURT: You may be seated.

10 Let me hear from the government on its view of this  
11 application.

12 MR. WILSON: I think, your Honor, certainly the  
13 government feels that it will need discovery in this matter. I  
14 am not entirely sure what type of summary judgment motion is  
15 being contemplated on an expedited schedule before fact  
16 discovery has been completed. Certainly we would have no  
17 objection. Although, I think your Honor has set a schedule for  
18 motions of release of assets to amending that to allow Harry  
19 Auto to make such a motion at this time. It does not sound  
20 like that will entirely address that claimant's concerns. I am  
21 not sure what our options are. If it makes sense to the Court,  
22 we'll be happy to proceed with a targeted expedited discovery  
23 as to Cary Auto. We'll need discovery of some kind before we  
24 go do a motion for summary judgment.

25 THE COURT: Here is my thought: I understand your

C546lebc

1 application the same way the government does, which is not  
2 directed at the temporary restraint but the very fact of a  
3 pending litigation. I understand that is in effect the  
4 unresolved claim against you guys doing business harm.

5 MR. BOYCE: That is correct, your Honor.

6 THE COURT: It doesn't sound like the parties met and  
7 conferred on this issue beforehand. In this forum it doesn't  
8 seem to be a particularly fruitful one for me to dig into the  
9 nuances of evidence that will be needed to be adduced to get us  
10 to a point where summary judgment could be resolved in your  
11 case. In the future, it is more fruitful if the parties have  
12 engaged and thought through the issues beforehand.

13 For the time being, I am inclined to deny that motion  
14 without prejudice. I will keep you on the same schedule as  
15 everyone else. That said, if you want to meet and confer  
16 with the government and figure out if there is some streamlined  
17 way, key to the facts and circumstances of claims against you  
18 to expedite summary judgment, I am all ears. But for the time  
19 being, I am keeping everything on a --

20 MR. BOYCE: I will go ahead and file the motion. I  
21 wanted to make the Court aware of the issue. I will confer  
22 with the government and file a motion for summary judgment.

23 THE COURT: Can I make a suggestion?

24 MR. BOYCE: Yes, sir.

25 THE COURT: Confer with the government first and then

C546lebc

1 determine what needs to be filed. It may be from the  
2 government's perspective very limited discovery is needed to be  
3 filed because of facts dealing with your client which means if  
4 you two work together it is more likely I will be getting an  
5 application that is joint or that allows me to make heads or  
6 tails of it and expedite things for you.

7 MR. BOYCE: We'll continue to do that.

8 THE COURT: So with the understanding that if parties  
9 want to seek expedited summary judgment, they need to preface  
10 it first with a meet-and-confer with the government.

11 Are there other comments or objections from the  
12 defense to the proposed case management plan the government has  
13 set forth?

14 MR. CLARK: Your Honor, just keeping the qualification  
15 that your Honor alluded to earlier that those defendants would  
16 have to be served obviously, it doesn't make sense to put  
17 motions that may be directed at service or personal  
18 jurisdiction before the time is served.

19 THE COURT: Once we go around the horn on this issue  
20 about the case management plan, I am going to turn next to the  
21 government's motion about service on counsel, which may be  
22 productive in some degree mooting that concern.

23 MR. CLARK: Your Honor, we would like to be heard on  
24 that.

25 THE COURT: I understand.

C546lebc

1           Anything else as to the case management plan?

2           MR. KALBIAN: Your Honor, I am in the same position as  
3 Mr. Clark's client. Obviously I am here on a special  
4 appearance -- limited appearance on behalf of these in Rem  
5 defendants. I wanted to make the record clear on that.

6           THE COURT: Anyone else on the case management plan?

7           MR. WILSON: Your Honor, I should just note because  
8 for whatever reason counsel for Global Shipping doesn't seem to  
9 have appeared today, I think it is set forth in my letter that  
10 they did have an objection to being put onto a discovery  
11 schedule before a ruling was had on their motion, alleging  
12 there is no personal jurisdiction.

13          THE COURT: I am going to deny that motion. There is  
14 going to be a common day for motions to dismiss and I think  
15 that is an appropriate motion to dismiss, but there is no  
16 reason it ought to be heard out of sync with other motions to  
17 dismiss by other defendants.

18          So that leaves us -- Yes.

19          MR. AYAD: Your Honor, on that particular issue we  
20 also filed a motion on jurisdictional grounds. We just want to  
21 make sure we're not waiving our right by attesting to this  
22 scheduling order that we are waiving any rights to  
23 jurisdiction.

24          THE COURT: Thank you. Nobody is waiving any rights  
25 by virtue of being here today.

C546lebc

1 MR. AYAD: Thank you.

2 THE COURT: I think the next thing rationally to turn  
3 to is the government's motion, which is very recently filed in  
4 terms of permission to effect service through alternative  
5 means.

6 Can the government briefly describe for the benefit of  
7 everyone here what it is seeking and why?

8 MR. WILSON: Yes, your Honor. The government is  
9 seeking two separate forms of relief here relating to serving  
10 the parties or personal defendants in this matter who have yet  
11 to be served. The first is that the Court authorized us to  
12 serve U.S. counsel for LCB, Ellissa and Ayash who entered a  
13 limited appearance in this matter as for forfeiture. We  
14 believe the record reflects that they are well suited and  
15 situated to give notice to these parties, that there is no bar  
16 in international law or Lebanese law on providing service in  
17 this manner and therefore it is appropriate for the Court to  
18 order that to move this litigation around.

19 The second form of relief is letters rogatory to be  
20 issued to Lebanon in order to effect service on the other  
21 defendants who have not yet put in any sort of appearance in  
22 this mater. And also to be clear to the Court, in order to  
23 perfect service in Lebanon on the three Lebanese defendants  
24 who have made a limited appearance here, just in abundance of  
25 caution if judgment were ever to be entered in this action to

C546lebc

1 ensure that things will smoothly proceed enforcing that  
2 judgment in Lebanon.

3 THE COURT: Very good. As to the second part, the  
4 letters rogatory, I don't know who, if anyone, in this room has  
5 standing to object to it. Let me see if there is anyone who  
6 objects to the letters rogatory component of the request?

7 MR. CLARK: Your Honor, I received this motion this  
8 morning. I printed it out 20 minutes before I came to court.  
9 I would like to read it before I take a position with regard to  
10 it as to my clients. I ask the Court simply to give us a  
11 chance to review the motion and take a motion on the issues  
12 that are raised both with regard to letters rogatory, which I  
13 do believe we have standing to object to. Certainly with  
14 regard to whether or not your Honor is going to order our  
15 clients be served. Again, I haven't looked into it, but first  
16 of all in reading the letter, I don't agree with all the  
17 factual recitations in the letter.

18 secondly, your Honor in granting that kind of relief  
19 you seem to be, and I don't know because I haven't had the  
20 chance to look at all the precedents, swallowing the special  
21 appearance going forward. By making a special appearance in in  
22 Rem case we sort of automatically give the Court the ability to  
23 say, Well, you are perfectly positioned to give actual notice.  
24 I don't know what is left of a special appearance in an in Rem  
25 case. I would like to think about that and present those

C546lebc

1 arguments to the Court before a decision is made. We can do  
2 that expeditiously, your Honor. I don't think it is fair to do  
3 it when I haven't had a chance to read the briefing.

4 THE COURT: Mr. Wilson, I have to say I am sympathetic  
5 to that. Although, it would be great to expedite service in  
6 this case. Having myself just received the brief in the last  
7 24 hours, it seems to me counsel are entitled to object to it.  
8 It is regrettable because had this motion been made earlier and  
9 litigated were it to be granted, all the people subject to it  
10 could then have been folded into the existing schedule on the  
11 case management plan. Because the motion is being made so late  
12 and I think I owe it to the people affected by it to have the  
13 opportunity to oppose it, even if granted you are going to have  
14 a group of people who are on a belated schedule, which I  
15 regret.

16 MR. WILSON: Your Honor, we do apologize that it took  
17 time to review our options and figure out our best course. We  
18 did not expect your Honor to rule on this today and certainly  
19 agree that the parties should have an opportunity to review it  
20 and consider it. We did want to make sure we got the motion  
21 filed and to you for this conference so we could set a schedule  
22 for any responses.

23 I think, and I don't want to prejudge how long counsel  
24 for the claimants will need, it is possible if we move  
25 expeditiously and if the issues raised are not ones that your

C546lebc

1 Honor feels are difficult for you to resolve that we could  
2 still have service made and be on the same schedule I believe.  
3 It would just require essentially a ruling by May 15th. I  
4 don't want to put any pressure on the Court. If they are  
5 further behind than that, I think we can make the schedule work  
6 even with people who are slightly delayed.

7 THE COURT: Are you going to want the right to reply  
8 to any briefs that are submitted in opposition?

9 MR. WILSON: I think we will want the opportunity once  
10 we see it; but if at all possible, we'll waive that so we can  
11 move along quickly if we feel it doesn't require one.

12 THE COURT: Mr. Clark, how much time do you want for  
13 an opposition brief?

14 MR. CLARK: I am in a slightly unique situation. I  
15 would normally say I would like 10 days. I am not at all sure  
16 given the situation where I work that it is going to be easy  
17 for me to file that motion within 10 days. We don't have a  
18 mailroom right now or the ability to ECF file. So I would ask  
19 your Honor for 14 days. I will try to do it as quickly as  
20 possible. If the Court can be understanding of a good faith  
21 effort to expedite this given some logistical issues, I would  
22 appreciate it. That will be a good faith effort given the  
23 logistical issues.

24 MR. KALBIAN: Your Honor, in terms of putting in  
25 opposition papers, I would like at least an additional seven

C546lebc

1 days to what the rules -- I think it is a 10-day period to  
2 respond for putting in opposition papers. Just my own schedule  
3 over the next week or so, I just would like to have the Court,  
4 if willing, give us an additional seven days on top of the 10  
5 days.

6 THE COURT: I am going to give defense counsel two  
7 weeks from today to file opposition papers with respect to both  
8 of the pending motions that the government has made and I will  
9 give the government three business days on top of that to reply  
10 if it wants to. So any opposition to the pending motion would  
11 be due May 18 and then the government's brief will be due May  
12 23rd, a Wednesday, if there is to be one in reply. I will try  
13 to respond quickly.

14 MR. CLARK: Thank you, your Honor.

15 THE COURT: To be clear I am going to then sign the  
16 case management plan, but obviously it has the carve out for  
17 entities that have not been served yet. I would urge the  
18 government to take whatever steps you would otherwise take in  
19 terms of normal service with respect to these entities because  
20 it is far from a foregone conclusion that the order will be  
21 approved.

22 MR. WILSON: We'll do. We will do everything we can.  
23 My colleague reminded me to make the record clear is that one  
24 of the reasons this motion was so late in coming was that we  
25 were waiting to see if Ellissa and Ayash would agree to waive

C546lebc

1 service, which would have made things less complicated.

2 THE COURT: Very good. I see another counsel has  
3 entered the room. Who is that?

4 MR. D'ERASMO: My apologies, your Honor. My train was  
5 slow from Maryland. Joseph D'Eraso for Hijazi General Trading  
6 Co.

7 THE COURT: Good morning.

8 Did I hear something from counsel who is on the phone?

9 MR. DeFOE: No, your Honor.

10 THE COURT: So I am going to sign the case management  
11 plan that the government had proposed.

12 MR. AYAD: Your Honor, was that for all defense  
13 counsel or just for the two parties that--

14 THE COURT: Any counsel who wishes to the discrete  
15 motions the government has made with respect to, number one,  
16 service through alternative means, and number two, the issuance  
17 of letters rogatory has two weeks to oppose those motions.  
18 This is not license to submit a brief on some other subject.  
19 If you are already served in a case, the relevant deadline for  
20 briefing are set in the case management plan.

21 MR. AYAD: Thank you, Judge. I have been on a plane  
22 all morning and I don't know what the motion is about.

23 THE COURT: Understood. Defense point is well taken  
24 that it is fair to give an opportunity for comment.

25 I would ask that those who oppose the motion here make

C546lebc

1 clear at the outset what your standing is with respect to each  
2 of the two applications the government has made.

3 MR. WILSON: Before we leave service, there is one  
4 other point. The government on April 12th had put in a request  
5 to have the period for service extended as to the personal  
6 defendants under Rule 4(m) until June 1. I don't believe that  
7 was ever so ordered. It didn't appear in the docket. I don't  
8 believe we received the ordered copy. Without pushing the  
9 Court for a resolution, I wanted to make sure that didn't slip  
10 through the crack.

11 THE COURT: It slipped through the crack. I don't  
12 remember seeing that.

13 MR. WILSON: Your Honor, we will resubmit it.

14 THE COURT: Resubmit it. Let me ask if there will be  
15 at some moment if any defense counsel expects to object to  
16 that, oppose that motion?

17 MR. CLARK: We do not object to that letter. We don't  
18 take a position on that letter.

19 THE COURT: Is there any counsel in this room who take  
20 a position on that letter? I assume, unlike me, it has not  
21 slipped through the cracks as to you.

22 MS. COWLES: Your Honor, I can tell you at the time  
23 this was after LCB had entered the claim but prior to Ellissa  
24 and Ayash entered claims, that letter was served on counsel for  
25 LCB but we didn't know counsel for Ellissa and Ayash yet so we

C546lebc

1 can provide a copy.

2 THE COURT: Very good. I will ask the government to  
3 serve that to me if at all possible today. I will reserve  
4 judgment on it for a couple days to give defense counsel an  
5 opportunity if anyone does object to do so, but please let me  
6 know of facts of an objection by the end of the day Monday so  
7 Tuesday I can rule on it.

8 MR. KALBIAN: What I heard your Honor say is that the  
9 government should serve that on you today. Will the government  
10 be serving that on me as well or will it be done  
11 electronically?

12 THE COURT: I think ECF for people who appear.

13 MS. COWLES: I think we probably would have it sent to  
14 your chambers and e-mailed it to all counsel, but we can put  
15 that on the docket.

16 THE COURT: Do all that to have belts and suspenders.

17 So we discussed the schedule for the case and the  
18 exception for people who have not been served. As to the  
19 pending motions to dismiss, again as mentioned I will treat the  
20 motions that have already been filed as complying with the  
21 deadline set in the case management plan for the opening brief.  
22 I am authorizing counsel who filed such an opening brief if  
23 they want to reply and submit replacement by the date set in  
24 the schedule to do so.

25 With respect to the motions directed at TROs, as I

C546lebc

1 mentioned I have a decision I want to read with respect to  
2 Cedar Exports. Before I do that is there anything else from  
3 any counsel here with respect to pending motions directed to  
4 the TRO or seeking release of property?

5 MR. WILSON: Not as the one seeking release of  
6 property.

7 THE COURT: Anything from any defense counsel on that  
8 subject? There is obviously a separate schedule that I set as  
9 to that.

10 I have prepared to rule on the Cedar Exports'  
11 decision, but before I do is there anything else from any  
12 counsel they want to raise today?

13 MR. WILSON: Yes, your Honor. As to the motion by A &  
14 J, which I believe was joined by Car UZD, requesting that the  
15 accounting required in the restraining order not apply to them  
16 under Fifth Amendment grounds, they alluded to this earlier but  
17 the government does believe any new issues were raised in the  
18 reply and would like to file surreply within one week from  
19 today.

20 THE COURT: That is so ordered.

21 Anything else from the government?

22 MR. WILSON: Yes, your Honor, one matter. I just want  
23 to clarify one thing that is essentially an omission from the  
24 letter that I submitted. I want to be fair to Cybamar Swiss  
25 who reminded I left them off the list of parties with whom

C546lebc

1 active settlement discussions were ongoing. I said no personal  
2 defendants had been engaged in settlement discussions. That is  
3 incorrect. Cybamar Swiss have been engaged in active  
4 settlement discussions and I wanted to make sure the record is  
5 clear on that.

6 THE COURT: Thank you for the clarification.

7 Anything further?

8 MR. WILSON: No, your Honor.

9 THE COURT: Anything further from defense counsel on  
10 any subject before I turn to Cedar Exports?

11 MR. MAZUREK: A clarification on the government's  
12 clarification. Since there are multiple Cybamar Swiss  
13 entities, I image he was referring to my prospective client  
14 Cybamar Swiss, GMBH, LLC, because my client is not related to  
15 the other entities.

16 THE COURT: I think I get that. I appreciate it.

17 MR. AYAD: Your Honor, I heard you ruled that the  
18 government has an opportunity to reply because there were  
19 additional statements made in the reply. I just want to have  
20 the opportunity if they do reply with additional, new  
21 information, new allegations, Judge, they we would be allowed  
22 to have an opportunity to reply on that.

23 THE COURT: I will reserve on that until you see what  
24 the reply says. It was a new argument that was made in the  
25 reply and my judgment, which I see the government shares, is

C546lebc

1 that it was appropriate to authorize the unusual surreply.

2 Whether there is license for a sur surreply, let's reserve on  
3 that and see if there is something else new opened up by the  
4 government's surreply.

5 MR. D'ERASMO: Your Honor, I have a pending motion to  
6 dismiss. I just want to confirm that the government's time to  
7 respond to that theoretically was April 26th. I understand  
8 accepting the government's scheduling order, does that mean it  
9 is extended as well by that scheduling order?

10 THE COURT: Had you been here earlier, I made clear  
11 that to the extent motions to dismiss have already been filed,  
12 they are being folded into the motion to dismiss schedule that  
13 is set out in the case management plan. I really think it  
14 behooves everybody, and certainly the Court, to have a  
15 coordinated schedule with respect to motions to dismiss  
16 litigation. There may or may not be need to be a second  
17 schedule set for late served defendants at least as to those  
18 already in the fold. I want anyone on the same schedule.

19 Anything else?

20 MR. WILSON: Your Honor, one more point. You  
21 discussed this earlier but it may be useful to convey that I  
22 have spoken to counsel for Dealer Services Corp. and they do  
23 agree that their motion, and indeed their claim in this matter,  
24 has been mooted by the settlements Eagle Auto and Golden Eagle  
25 and so that motion doesn't need to be addressed by the Court

C546lebc

1 going forward. Similarly that Eagle Auto's motion for release  
2 of restrained assets, since that case has also settled that is  
3 also moot and off the schedule.

4 THE COURT: So the extent the docket does not so  
5 reflect as to any pending motion, I will ask the government to  
6 submit a letter seeking making clear what has been mooted and  
7 what has not been and why and we'll issue an appropriate order  
8 that terminates those motions.

9 MR. WILSON: We will, your Honor. Thank you.

10 THE COURT: Good.

11 Counsel for Hijazi, because you weren't here at the  
12 beginning, I just want to clarify that you will have the  
13 opportunity if you want to withdraw the current motion to  
14 dismiss and submit a revised one by the deadline that is set in  
15 the case management plan. You are at liberty to do that.

16 MR. D'ERASMO: Thank You, Judge.

17 THE COURT: Anything further from defense counsel  
18 before I read my ruling as to Cedar?

19 I am going to read that and then we're done for the  
20 day. Going once. Going twice. Anything further that anyone  
21 wants to put on the agenda today?

22 I have here a ruling on one of the pending motions in  
23 the case. It is a fully submitted motion. It is a petition by  
24 Cedar Exports Auto Sales pursuant 18, U.S.C. 983(f) for the  
25 immediate release of property seized by the government.

C546lebc

1                 By way of background, the initial conference in this  
2 matter was originally scheduled for March 14th, 2012, but the  
3 government in a letter dated March 6, 2012, asked that the  
4 initial conference be adjourned ultimately to this day to  
5 permit ongoing settlement negotiations with various entities.  
6 Cedar Exports was the only party to object to that request. In  
7 a letter dated March 7, 2012, it asserted that hardship was  
8 being brought on the company by delaying the resolution of the  
9 government's claim with respect to it. Accordingly, the Court  
10 met with the government and counsel for Cedar Exports on  
11 March 8, 2012. On the following day, March 9th, 2012, the  
12 Court set a briefing schedule with respect to Cedar Exports  
13 petition for release of its restrained assets pursuant to 18,  
14 U.S.C, 983(f). That petition has been fully briefed.

15                 Cedar Exports has identified the two categories of  
16 seized properties that it asks to be released as follows:  
17 First is \$137,327.14 held at First Tennessee Bank. Second, are  
18 21 cars valued collectively at \$114,100, which were seized from  
19 Cedar Exports in Jacksonville, Florida. I should add that four  
20 additional cars valued collectively at \$49,225 were seized from  
21 Cedar Exports' lot in Mt. Juliet, Tennessee, and were  
22 originally covered by this petition. However, there has since  
23 been a stipulated order of settlement with the government  
24 providing for release of those four cars to a Cedar Exports  
25 creditor, Manheim Automotive Financial Services, Inc. As a

C546lebc

1 result those four cars are no longer implicated by this  
2 petition. Cedar Exports is asking the Court to direct the  
3 Cedar Exports may (1) transfer the \$137,327.74 presently held  
4 in First Tennessee Bank to any person or entity, except those  
5 that are believed to be affiliated with Hizballah; (2) to use  
6 its bank account with First Tennessee Bank to conduct business;  
7 and (3) to sell or dispose of the 21 cars seized from the  
8 Jacksonville lot to any person or entity, again except those  
9 that are believed to be affiliated with Hizballah.

10 Congress enacted 18 U.S.C. 983(f) as part of the Civil  
11 Asset Forfeiture Reform Act of 200 to provide a mechanism for  
12 the release of property during the pendency of the civil  
13 forfeiture action. Section 983(f)(1) provides that a claimant  
14 is entitled to immediate release of seized property if a  
15 claimant can demonstrate four things: (A) that the claimant  
16 has a possessed interest in the property; (B) that the claimant  
17 has sufficient ties to the community to provide assurance that  
18 the property will be available at the time of the trial; (C)  
19 that the continued possession by the government pending final  
20 disposition of the forfeiture proceedings would cause  
21 substantial hardship to the claimant; (D) that claimant's  
22 likely hardship from the continued possession by the government  
23 of the seized property outweighs the risk that the property  
24 will be destroyed, damaged, lost, consealed, or transferred if  
25 it is returned to the claimant during the pendency of the

C546lebc

1 proceedings. A party cannot invoke relief under this provision  
2 if, pursuant to 18, U.S.C., Section 983(f)(8), the seized  
3 property is contraband that does not constitute the assets of a  
4 legitimate business.

5 In the Court's view, the decisive provision as to  
6 Cedar Exports' claims is Section 983(f)(1)(d). As to first  
7 subsection 983(f)(A) Cedar Exports clearly has a possessory  
8 interest in the property in question. As to the second  
9 subsection, 983(f)(1)(B), Cedar Exports also has represented  
10 without any specific reputation by the government that its  
11 president and sole member Khalil Abdelkhalek is a naturalized  
12 U.S. citizen, who has close family ties to central Tennessee  
13 and has no interest in leaving the country. As to the third  
14 subsection, Section C, Cedar Exports has also represented  
15 credibly and apparently without dispute that the continued  
16 freeze of Cedar Exports' assets, including its bank account, is  
17 working substantial hardship on its business. I specifically  
18 note in this regard the very detail and helpful declaration  
19 that I have received from Mr. Abdelkhalek.

20 However, under subsection 983(f)(1)(D) Cedar Exports'  
21 interest must be balanced against the competing interest of  
22 the government. The issue is whether Cedar Exports' likely  
23 hardship from the continued seizure outweighs the risk that  
24 property will be transferred during the pendency of the  
25 proceedings.

C546lebc

1                  Subsection D requires the Court to balance hardship  
2 for the claimant against the risk of the government. On the  
3 one hand, Cedar Exports and Mr. Abdelkhalek assert that the  
4 company continues to suffer hardship in the form of  
5 depreciating assets, unpaid debt, damage to reputation and  
6 potential bankruptcy. On the other hand, the government would  
7 contend that the assets in question will be unfrozen, they  
8 will be dissipated. The government notes that Cedar Exports  
9 has not set aside any equivalent replacement assets. It argues  
10 Cedar Exports is merely speculating when it asserts that  
11 because Cedar Exports business has an interest in remaining  
12 successful, equivalent assets would necessarily be available  
13 for forfeiture in the future in the event of the verdict for  
14 the government.

15                  The Court finds that, at some point, Cedar Exports has  
16 not satisfied its burden as to Section 983(f)(1)(D). The Court  
17 credits for the purpose of this motion Cedar Exports'  
18 representations as to the impact of the continued seizure on  
19 its business. However, on the other side of the equation,  
20 which is the risk to the government in the event of a verdict  
21 in its favor, the Court simply can not credit Cedar Exports'  
22 claim that there is no risk for the government presented by the  
23 unfreezing of these assets. I find that that risk is very  
24 substantial here, indeed overwhelming, and that it outweighs  
25 the likely hardship to Cedar Exports.

C546lebc

To begin with, the Court notes that Cedar Exports itself is asking, quite literally, to dissipate the assets that are currently frozen, in other words, to give these assets to third parties. Cedar Exports' petition specifically asks the Court to permit Cedar Exports to "transfer, assign, pledge, or dispose of in any manner" the money held in its account at First Tennessee Bank. Notably, Cedar Exports is not representing that in exchange for this transfer, Cedar Exports will receive property that could then itself be frozen so as to protect the government's legitimate interests. On the contrary, in its letter dated March 7, 2012, Cedar represented to the Court that "almost all of the assets frozen . . . are moneys currently significantly overdue to U.S. auto auction Creditor." It thus appears clear assets would be transferred to creditors if the Court granted the request. Under these circumstances it is clear that if the order is granted, the assets in question will be dissipated.

Nor has Cedar Exports given any solid assurance, let alone a guarantee, that substitute or equivalent assets would be available in the event of a judgment favoring the government. Cedar Exports expresses the hope that its business will prosper and yield substiute assets that could be seized, but that is not close to a sufficient guarantee. Without a more concrete showing that the government's interest would be protected in the event the assets at issue were unfrozen, the

C546lebc

Court simply cannot find under Section 983(f)(1)(D) that Cedar Exports has done anything to mitigate the risk that in the event of a judgment favoring the government, there would be no assets to satisfy that judgment. Simply put, without a tangible, reliable basis to conclude that either the disputed assets or their equivalent will be available to the government in the event of a verdict, the Section 983(f)(1)(D) balance tips decidedly in favor of the government and in favor of maintaining the current freeze.

In so ruling, I am not minimizing the current hardship to Cedar Exports. I am also not preventing Cedar Exports from moving again for the same relief in that the event in connection with a revised petition it can provide a solid guarantee that equivalent assets would be available in the event of judgment for the government.

In seeking relief under 983(f)(1), Cedar Exports has argued the government is unlikely to succeed on the claims against it on the merits. The Court is not reaching that issue because it is not relevant under Subsection d, which is the basis for the Court's ruling. Subsection D balances the hardship to the claimant against the risk property will be destroyed, damaged, loss, concealed, or transferred; but it does not supply a charter for the Court at this stage to prejudge the outcome of the merits.

Let me add this final thought: Cedar Exports has

C546lebc

1 demonstrated in its motion papers quite constructively, that it  
2 is prepared it adopt remedial measures proposed by the  
3 government in exchange for release of its assets. Other  
4 parties in this case have been able to work out settlements  
5 involving the adoption of such remedial measures coupled the  
6 negotiated forfeiture terms. I would urge the parties to  
7 continue discussing whether a resolution along these lines is  
8 achievable.

9 That is my ruling and I will issue an order today that  
10 incorporates by reference the reasoning set forth herein.

11 Is there anything further from the government?

12 MR. WILSON: No, your Honor.

13 THE COURT: Anything further from any defense counsel?

14 I wish you well.

15 ooo  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25